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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1998

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, AND ROBERT A. JUDGE, SR., SECRETARY OF THE DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY
Petitioners

v.

FELICE NEWMAN AND STEVE ZUPCIC,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State violates the First Amendment's Establishment Clause when it exempts religious publications and articles, among many other things, from its sales and use tax?

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 728 A.2d 351 and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The opinion of the Commonwealth Court of Pennsylvania is reported at 693 A.2d 266 and is reprinted at Pet. App. 16a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 21, 1999, and this petition has been filed within ninety days of that date. The Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides in relevant part that "Congress shall make no law respecting an establishment of religion...." U.S. Const., Amend. I.

2. The relevant portions of the Pennsylvania Tax Reform Code of 1971, Pa. Stat. Ann., tit. 72, §§ 7101 through 10004 (Purdon 1990 & Supp. 1998-99), are reprinted at Pet. App. 45a.

Section 7202 of the Tax Reform Code imposes a tax of six per cent on the retail sale or use of personal property within the Commonwealth. Pet. App. 45a. Section 7204 of the Code excludes from this tax over forty categories of items, Pet. App. 45a-58a, including "religious publications sold by religious groups and Bibles and religious articles." Section 7204(28); Pet. App. 50a.

STATEMENT OF THE CASE

Pennsylvania imposes a tax on the sale or use of personal property within the Commonwealth. A wide variety of items, however, are exempt[1] from this tax, and among these are religious publications and articles. The respondents claim that this exemption violates the Establishment Clause of the First Amendment to the Constitution, and they brought this action, pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief.

1. The sale or use tax — six per cent of the purchase price — is imposed by Section 7202 of the Pennsylvania Tax Reform Code of 1971, Pa. Stat. Ann. tit. 72, § 7202 (Purdon 1990), *reprinted at* Pet. App. 45a. Forty-six categories of items are exempted from this tax, and these exemptions are listed in Section 7204 of the Tax Reform Code, Pa. Stat. Ann. tit. 72, § 7204, *reprinted at* Pet. App. 45a-58a.

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[1]In this petition, we use the terms "exempt" and "exemption" in their generic sense. While "exemption" is a term of art with a distinct meaning in Pennsylvania tax law, that distinction is not germane to the constitutional issue presented in this petition.

In Pennsylvania tax law, there is a difference between "exemptions" and "exclusions." "Exemptions" are items that, while ordinarily taxed, are not taxed if specified criteria are met. "Exclusions," on the other hand, are items which are not taxed at all. Exemptions are strictly construed against the taxpayer; while exclusions are strictly construed against the taxing body. *Adelphia House Partnership v. Commonwealth*, 709 A.2d 967, 970 n.9 (Pa. Cmwlth. 1998); *Commonwealth v. Sitkin's Junk Co.*, 412 Pa. 132, 141, 194 A.2d 199, 204 (1963).

Among the categories exempted by Section 7204 are a wide array of items related to expressive, charitable, educational and religious activities. These include newspapers, magazine subscriptions, and school textbooks; motion pictures in commercial exhibitions, mail order catalogues, and tourist promotion materials; sales to charitable, educational and religious organizations; and food and beverages sold by schools, churches and nonprofit sports associations.[2]

In addition, Section 7204 exempts from tax many common necessities, taxation of which would fall with special harshness on persons of low or moderate income. Thus food, for example, is generally exempt from tax (although restaurant meals are not). *Id.*, § 7204(29); Pet App. 50a-51a. Water, clothing, fuel, medical supplies, certain toiletries and burial items are similarly exempt.[3]

This case concerns subsection (28) of Section 7204, which exempts from tax "[t]he sale ... or use of religious publications sold by religious groups and Bibles and religious articles." In administering this provision, the Pennsylvania

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[2]These exemptions are found, respectively, in subsections (10)(sales to charitable and religious organizations), (29)(iii)(food sold by schools and churches), (30)(newspapers), (33)(textbooks), (34)(motion pictures), (35)(mail order materials), (40)(tourism materials), (49)(food sold by sports programs), and (50)(magazine subscriptions) of Section 7204. Pet. App. 47a, 51a-56a.

[3]Section 7204(4)(toothpaste, toilet paper, feminine hygiene products, etc.), (5)(steam, gas, fuel oil, electricity), (17)(medicine and medical supplies, crutches and wheelchairs, false teeth and prosthetics), (18)(coal), (25)(water), (26)(clothing and shoes) and (31)(caskets and vaults). Pet. App. 46a-49a, 51a.

Department of Revenue interprets the term "Bible" to encompass the sacred texts of all religious groups, including such books as the Koran and the Book of Mormon; and the Department does not discriminate against any religious group. Pet. App. 3a, 19a.

Respondent Felice Newman owns and operates a publishing company; none of the books she publishes are exempt from sales tax. Respondent Steve Zupcic has purchased both exempt and non-exempt publications.

2. The respondents[4] brought this action in Pennsylvania's Commonwealth Court, seeking declaratory and injunctive relief. They claimed that the tax exemption for religious writings and articles violates the Establishment Clause of the First Amendment to the Constitution, and the corresponding provision of the Pennsylvania Constitution.[5] Pet. App. 19a; *see* Pa. Const., Art. 1, § 3. The parties stipulated to the relevant facts, Pet. 18a-19a, and filed cross-motions for summary judgment.

Commonwealth Court heard the case *en banc*, and a divided court granted judgment to the respondents, holding that the exemption violates both the federal and Pennsylvania constitutions. In upholding respondents' federal claim, the majority judges declined to follow this Court's decision in *Walz*

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[4]The respondents were originally joined by a third plaintiff, Henry Haller, whose claims were dismissed for lack of standing, and who did not appeal that decision. Pet. App. 2a, n.3; 17a n.2.

[5]The respondents also claimed that the exemption violates the First Amendment's Press Clause, and the corresponding provision of the Pennsylvania, *see* Pa. Const., Art. 1, § 7. Pet. App. 3a. Neither of the courts below, however, addressed these claims. Pet. App. 3a, n.5;14a, n.11.

v. Tax Comm'n of New York City, 397 U.S. 664 (1970), in which the Court upheld the constitutionality of a tax exemption for the real property of religious organizations. In the majority's view,

> [i]t is one thing for a state to exempt from taxation the real property owned by a religious organization which is used exclusively for religious worship. It is quite a different matter for a state to exempt from taxation tangible personal property of a religious nature which is sold at retail.

Pet. App. 28a-29a. Rather, the majority relied on *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), in which the Court struck down a Texas law which, like Pennsylvania's, exempted certain religious publications from a sales tax. Pet. App. 22a-25a. *Texas Monthly*, however, did not produce a majority opinion, and the Commonwealth Court majority therefore relied primarily on the plurality opinion written by Justice Brennan for himself and two other Justices. Pet. App. 22a-25a; *see Texas Monthly*, 489 U.S. at 5 (opinion of Brennan, J.). The majority judges did not separately analyze the respondents' claim under the Pennsylvania Constitution, but observed that the analysis of their federal claim was "'equally apposite'" to their state-law claim. Pet. App. 20a-21a, n.7, *quoting Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 367 (Pa. 1974).

The dissenting judges argued that *Texas Monthly* lacks precedential value because "the opinions ... are so splintered that it is impossible to find sufficient common ground between them with which to determine the *ratio decidendi* of the Court." Pet. App. 39a. They would have followed the "clear majority" decision in *Walz*, Pet. App. 39a, which they found indistinguishable from this case. Pet. App. 39a-43a.

3. On appeal, the Pennsylvania Supreme Court affirmed solely on the ground that "this tax exemption violates the Establishment Clause of the United States Constitution." Pet. 2a & n.2. The Supreme Court did not address the respondents' claim under the Pennsylvania Constitution.

The Supreme Court read *Texas Monthly* as standing for the proposition that tax exemptions must meet a "breadth of coverage" standard in order to pass Establishment Clause muster. Pet. App. 9a. The Supreme Court recognized that Justice Brennan's plurality opinion in that case garnered the votes of only two other Justices, *ibid*, but the state Supreme Court nevertheless believed that

> a majority of the Court in *Texas Monthly* clearly recognized that tax exemptions that include religious organizations must have an overarching secular purpose that equally benefits similarly situated nonreligious organizations....

Pet. App. 9a-10a.

The state Supreme Court acknowledged, however, that the dissenting judges in the court below had "reasonable grounds for contending that the Establishment Clause does not categorically prohibit legislation that *exclusively* benefits religious organizations," Pet. App. 11a (emphasis in original), because this Court's Establishment Clause decisions do not chart a straight course. To the contrary, "in some circumstances legislatively created exemptions that benefit religious organizations or religious practices have survived Establishment Clause challenges." *Ibid, citing Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987). However, the state Supreme Court thought that a more stringent

standard applies to sales tax exemptions because "[t]he Supreme Court appears to have been more skeptical of sales tax exemptions than other legislative exemptions that exclusively favor religion." Pet. App. 11a.

Turning to the Pennsylvania tax statute, the state Supreme Court noted that, in addition to the exemption for religious publications and articles, the statute likewise exempts, among other things, newspapers, textbooks and magazines. Pet. App. 12a, n.9. The Court held, however, that these exemptions could not rescue the exemption for religious publications, because "unlike the exemption for religious publications, these exemptions are content-neutral, and we discern no broader secular purpose that would fairly encompass all these exemptions in a single scheme." Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

Religion-based exemptions from tax laws are a long-standing and widespread feature of American law, and their validity under the Establishment Clause presents an important question on which the Court has twice spoken in the past. Unfortunately, in the Court's most recent attempt to address this issue, the Court was unable to muster a majority for any single view. Moreover, the result in that case, and at least some of the reasoning which supports it, are in considerable tension with the Court's earlier decision on this subject, and with other decisions upholding religion-based exemptions from general laws. The Court should therefore take this opportunity to clarify the permissible scope of religion-based tax exemptions.

I. The Court Should Take This Opportunity to Resolve The Tension Between *Texas Monthly v. Bullock* And Other Cases Addressing Religion-Based Exemptions

From General Laws.

Walz v. Tax Comm'n. The Court first addressed the validity of religion-based tax exemptions in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970). The law challenged in *Walz* was a New York statute granting property tax exemptions for properties owned by religious organizations and used solely for religious worship; this in turn was part of a general provision which exempted properties owned by religious, educational and charitable organizations and used exclusively for those purposes. *Id.* at 666-67.

The Court first remarked that the purpose of the tax exemption was neither to advance nor to inhibit religion; "it is neither sponsorship nor hostility." *Id.* at 672. Nor did the tax exemption foster "an excessive government entanglement with religion." *Id.* at 674. To the contrary, "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676.

Finally, the Court noted the national tradition, both long-standing and widespread, of exempting religious property and activity from both property and income taxes. *Id.* at 676-78. "Few concepts are more deeply embedded in the fabric of our national life ... than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Id.* at 676-77. Yet "[n]othing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church...." *Id.* at 678. The Court said,

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its

> revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' *There is no genuine nexus between tax exemption and establishment of religion.*

Id. at 675 (emphasis added).

Two Justices concurred in the judgment in *Walz* on the ground that New York's statute did not exempt religious organizations *per se*, but only as part of a broader class of entities

> whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of "good works" ... that might otherwise have to be assumed by government.

Id. at 696 (Harlan, J., concurring); *see id.* at 687 (Brennan, J., concurring).

But the Court specifically rejected this "social welfare yardstick" as itself of doubtful constitutionality:

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others — family counselling, aid to the elderly and the infirm, and to children.... To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the

> worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Id. at 674. Rather, the Court upheld the exemption as a permissible accommodation of religion: "it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." *Id.* at 673.

Texas Monthly, Inc. v. Bullock. The Court next addressed this issue in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). In *Texas Monthly*, the Court struck down a Texas law which exempted from its sales tax "'[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.'" *Id.* at 5, *quoting* Tex. Tax Code Ann. § 151.312 (1982).

However, no opinion in *Texas Monthly* commanded a majority of the Court. Justice Brennan announced the judgment of the Court and an opinion in which he adhered to the minority view which he had expressed, but the Court had rejected, in *Walz*:

> The breadth of New York's property tax exemption [in *Walz*] was essential to our holding that it ... possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced

> the community's well-being and that would otherwise have to be funded by tax revenues or left undone.

Id. at 12 (opinion of Brennan, J.). Justice Brennan's opinion, however, garnered the support of only two other Justices. Justice White did not address the Establishment Clause at all, but concurred in the judgment on the ground that the law violated the Free Press Clause. *Id.* at 26 (White, J., concurring). The crucial votes for striking down the statute came from a concurring opinion by Justice Blackmun who, joined by Justice O'Connor, agreed that the law violated the Establishment Clause but did not join Justice Brennan's opinion. *Id.* at 26 (Blackmun, J., concurring).[6]

Rather, Justice Blackmun opted for "a narrow resolution of the case before us." *Id.* at 28. "We need decide here only whether a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause." *Ibid* (emphasis in original). He concluded that it does, but with little explanation of his reasoning.

Justice Blackmun's opinion recognized that not all exemptions conferred exclusively on account of religion were invalid. *Id.* at 28, *citing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). But he made little attempt to explain why *tax* exemptions, as opposed to other forms of exemptions, should be subject to a "breadth of coverage" requirement, beyond asserting that "[a]lthough some forms of accommodating religion are

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[6]Justice Scalia, joined by the Chief Justice and Justice Kennedy, dissented. *Id.* at 29 (Scalia, J., dissenting).

constitutionally permissible, ... this one surely is not." *Ibid.*

Nor did Justice Blackmun's opinion provide much guidance on the "breadth of coverage" standard. He suggested that a statute which exempted not only religious literature but also "philosophical literature distributed by nonreligious organization devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong," would survive scrutiny, but declined to "impose it on a State as its only legislative choice." *Id.* at 27-28. Justice Blackmun's opinion thus provided little real guidance on what sort of tax exemption would, in his view, pass constitutional muster.

Finally, none of the opinions supporting the judgment in *Texas Monthly* purported to overrule, or even criticized, *Walz*, which remains good law. Indeed, the Court repeatedly cited *Walz* with approval just two years ago. *See Agostini v. Felton*, 521 U.S. 203, 205-06 (1997); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 590 & nn.23-25 (1997).

All of this has left the law unsettled and uncertain. The fragmented decision in *Texas Monthly* remains the Court's latest word on this subject; and yet the result in *Texas Monthly* stands in considerable tension not only with *Walz*, but also with cases such as *Amos*, which expressly approved an exemption from Title VII's anti-discrimination provisions for religious groups alone. *Texas Monthly*, 489 U.S. at 45 (Scalia, J., dissenting). Nor is it easy to see just what *Texas Monthly* stands for, beyond its bare result. As discussed above, Justice Brennan's plurality opinion rests on premises which a clear majority of the Court rejected in *Walz*; while Justice Blackmun's concurrence sheds little light on his reasoning. The Court should review this case to clarify the analysis of religion-based exemptions from tax laws.

II. The Constitutionality of Religion-Based Tax Exemptions Is an Important Issue.

Pennsylvania's statute is neither novel nor unusual. To the contrary, as the Court recognized in *Walz*, "[f]ew concepts are as deeply embedded in the fabric of our national life" as tax exemptions for religious organizations and religious exercise. *Id.* at 676. As the dissenting Justices pointed out in *Texas Monthly*, at least 15 States at that time exempted religious literature from sales tax. *Id.* at 31 (Scalia, J., dissenting). In addition,

> [a]t least 45 States provide exemptions for religious groups without analogous exemptions for other types of nonprofit institutions. For over half a century, the federal Internal Revenue Code has allowed "ministers of the gospel" (a term interpreted broadly enough to include cantors and rabbis) to exclude from gross income the rental value of their parsonages.

Id. at 31-33 (Scalia, J., dissenting)(citations and footnotes omitted). "In short, religious tax exemptions ... permeate the state and federal codes, and have done so for many years." *Id.* at 33 (Scalia, J., dissenting). The widespread nature of these exemptions, and their longstanding place in our law, make it all the more important that the Court clarify their status.

CONCLUSION

The Court should grant the petition.

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July 20, 1999

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[J-105-98]
THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

HENRY HALLER, FELICE NEWMAN AND STEVE ZUPCIC, INDIVIDUALS, Appellees	: No. 0049 M.D. Appeal Docket 1997
v.	: Appeal from the Order of Commonwealth Court dated May 1, 1997 at No. 241 M.D. 1993, granting petitioners' motion for summary judgment
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, AND ROBERT A. JUDGE, SR., SECRETARY OF THE DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY, Appellants	: ARGUED: April 28, 1998

OPINION

DECIDED: APRIL 21, 1999

MADAME JUSTICE NEWMAN

This case presents a constitutional challenge to Pennsylvania's sales tax exemption for "the sale at retail or use of religious publications sold by religious groups and Bibles and

religious articles."[1] We affirm the Commonwealth Court's determination that this tax exemption violates the Establishment Clause of the United States Constitution.[2]

Appellees are taxpayers who publish and purchase books that do not qualify for the tax exemption.[3] Appellees instituted

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[1]Section 204(28) of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7204(28), contains the exemption in question, and provides:

> The tax imposed by section 202 shall not be imposed upon
> * * *
> (28) The sale at retail or use of religious publications sold by religious groups and Bibles and religious articles.

The Department of Revenue's regulation pertaining to this exemption is found at 61 Pa.Code § 31.3(22), and provides:

> The tax does not apply to the following:
> * * *
> (22) Religious publications sold by religious groups. Sales or use of bibles and religious articles are exempt.

[2]The Establishment Clause of the First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion...." U.S. CONST. amend. I. This prohibition applies to state governments by operation of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[3]Appellee Haller was dismissed from the case for lack of (continued...)

this action in Commonwealth Court against the Pennsylvania Department of Revenue, seeking an injunction prohibiting enforcement of the tax exemption and a declaratory judgment that the exemption violated (1) the Establishment Clause of the United States Constitution; (2) Article I, Section 3 of the Pennsylvania Constitution; (3) the Press Clause of the United States Constitution;[4] and, (4) Article I, Section 7 of the Pennsylvania Constitution. The parties stipulated that the Department of Revenue interprets the phrase "Bible" as used in the statute and regulation to encompass the sacred texts of all religious groups, and that the Department does not discriminate against any religious groups in its enforcement of the statute and regulation.

The Commonwealth Court, *en banc*, ruled that the tax exemption violated the Establishment Clause of the United States Constitution.[5] Relying primarily on the United States Supreme Court's opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the majority of the Commonwealth Court found that the tax exemption fails to serve a secular purpose and therefore does not pass the constitutional bar of the Establishment Clause. Two judges of the Commonwealth Court dissented, arguing that the exemption is similar to one that the

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[3](...continued)
standing. That dismissal is not implicated in this appeal.

[4]The Press Clause of the First Amendment of the United States Constitution provides, "Congress shall make no law...abridging the freedom of speech, or of the press...." U.S. CONST. amend. I.

[5]Because of its disposition of Appellees' challenge, the Commonwealth Court did not address Appellees' remaining constitutional claims.

Court upheld against an Establishment Clause challenge in *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), and noting that Justice Brennan's opinion in *Texas Monthly* was a plurality opinion and, therefore, not strictly binding authority. The dissenters further opined that Establishment Clause jurisprudence has created a "neutral zone" with respect to a government's decision to tax, or to exempt, religious institutions, and that the Court's opinions in *Walz* (upholding a tax exemption that included religious institutions against an Establishment Clause challenge) and *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) (denying a Free Exercise Clause[6] challenge to a generally- applicable tax), set the boundaries of this "zone." According to the dissenters, the Pennsylvania legislature's decision to exempt religious publications sold by religious groups and Bibles and religious articles fits within this permissible zone.

For twenty-six years, the starting point for analysis of all Establishment Clause challenges was with the standard established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Lemon test required that, in order for a government action to survive an Establishment Clause challenge, the state needed to show (1) that it serves a secular purpose; (2) that its principal or primary effect is one that neither advances nor inhibits religion; and, (3) that it does not foster an excessive government entanglement with religion. Id. at 612--13. However, in 1997, the United States Supreme Court issued an opinion in which it recognized that its Establishment Clause jurisprudence had "significantly changed" during the past decade. *Agostini v.*

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[6]The Free Exercise Clause of the First Amendment follows the Establishment Clause; the two clauses provide, "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof...." U.S. CONST. amend. I.

Felton, 117 S.Ct. 1997, 2017 (1997). In *Agostini*, the Court reevaluated whether permitting public school teachers in Title I special education programs to teach inside the classrooms of sectarian schools violated the Establishment Clause, as the Court had explicitly held in *Aguilar v. Felton*, 473 U.S. 402 (1985). The Court acknowledged that subsequent decisions from the Court undermined some of the assumptions that underpinned *Aguilar*, particularly the presumption that "public employees will inculcate religion simply because they happen to be in a sectarian environment." *Agostini*, 117 S.Ct. at 2016. With respect to New York City's Title I program, the Court concluded

> [the program] does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Id.

The relevant question here is whether this "significant" change in Establishment Clause jurisprudence recognized in *Agostini* represents the end of the *Lemon* test, or is merely a revision to the Court's analysis of government aid programs within the *Lemon* framework. The importance of this question is in determining whether the *Texas Monthly* decision, which was built solidly on the foundation of the *Lemon* test, still stands, or whether the Court has declared that constitutional structure to be unsound.

It appears that, despite the language in *Agostini* announcing significant changes in Establishment Clause

jurisprudence, the Court has not yet abandoned the guidelines from *Lemon*. First, the Court had the opportunity to eliminate *Lemon*, in the same manner that it explicitly overruled *Aguilar*, but it did not do so. Indeed, all citations to *Lemon* in *Agostini* are either neutral or favorable, and not critical. Second, the focus of *Agostini* is specifically on government special education programs and the constitutional restraints on how this aid may be provided to students in sectarian schools, and not on a fundamental revision of all disputes implicating the Establishment Clause.[7] Finally, other courts considering the question have determined that *Lemon* remains good law in the wake of *Agostini*. *See Rojas v. Fitch*, 127 F.3d 184 (1 st Cir.1997), *cert. denied*, 118 S.Ct. 2341 (1998).

Since the *Lemon* test still stands, we must address the problem raised by the disagreement below and reconcile *Walz* with the plurality opinion in *Texas Monthly*. In *Walz*, which was decided before *Lemon*, the Court upheld, in the face of an Establishment Clause challenge, a New York property tax exemption that covered:

> [r]eal property owned by a corporation or

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[7]The Court held:

> [w]e therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here.

Agostini, 117 S.Ct. at 2016.

> association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes....

Walz, 397 U.S. at 667, n. 1. In holding that the exemption did not offend the Establishment Clause, the Court observed that:

> [i]t has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.

Id. at 672-73. The Court also noted that "[t]here is no genuine nexus between tax exemption and establishment of religion," and that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

When presented with an Establishment Clause challenge to Texas' tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith," *Texas Monthly*, 489 U.S. at 5, the Court attempted to reconcile the holding of *Walz* with the Establishment Clause standard promulgated in

Lemon. The "secular purpose" prong of the *Lemon* test posed a difficult problem to the Court's effort to harmonize the broad language from *Walz* respecting tax exemption of churches with the principle that legislation designed specifically and exclusively to benefit religion violated the Establishment Clause. Justice Brennan, author of the plurality opinion in *Texas Monthly*, relied on the breadth of the tax exemption involved in *Walz* to distinguish it from Texas' narrow exemption. As Justice Brennan noted:

> [t]he breadth of New York's property tax exemption was essential to our holding that it was "not aimed at establishing, sponsoring, or supporting religion,"...but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone.

Texas Monthly, 489 U.S. at 12 (citing *Walz*, 397 U.S. at 674). Texas' tax exemption, by contrast, lacked "a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups." 489 U.S. at 17. Because the Texas tax exemption was limited to religious periodicals, Justice Brennan concluded that it lacked "sufficient breadth to pass scrutiny under the Establishment Clause." *Id.* at 14.

In a strenuous dissent, Justice Scalia argued that Justice Brennan had misinterpreted the holding of *Walz*, and that the Texas exemption did serve a secular purpose: the "accommodation of religion." *Id.* at 40. Contrary to Justice

Brennan's interpretation that the *Walz* Court had upheld the New York tax exemption because it included both religious and secular organizations, Justice Scalia countered that, "[t]he Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion as an exemption for religion." *Id.* at 38. Complaining that *Walz* had established categorical approval of religious tax exemption, and criticizing Justice Brennan's "breadth of coverage" approach, Justice Scalia wrote, "if the Court [in *Walz*] had intended to rely upon a 'breadth of coverage' rationale, it would have had to identify some characteristic that rationally placed religion within the same policy category as the other institutions." *Id.* at 36--37.

Presently, the Department of Revenue contends that because Justice Brennan's opinion in *Texas Monthly* was a plurality opinion, we need not follow it in determining whether Pennsylvania's tax exemption violates the Establishment Clause. We disagree. Although Justice Brennan's opinion garnered the votes of only two other Justices, it would be incorrect to conclude that the "breadth of coverage" standard did not have the support of a majority of the Court. As Justice Blackmun, joined by Justice O'Connor, noted in his Concurring Opinion in *Texas Monthly*, "[i]n this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages." *Id.* at 28. Moreover, even Justice Blackmun's more limited interpretation of the Court's holding in *Texas Monthly* conceded the "breadth of coverage" problem: "[w]e need decide here only whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause. I conclude that it does." *Id.* Thus, a majority of the Court in *Texas Monthly* clearly recognized that tax exemptions that include religious organizations must have an overarching secular purpose that equally benefits similarly situated nonreligious

organizations, and other courts interpreting *Texas Monthly* have so held. *See Finlator v. Powers*, 902 F.2d 1158 (4 th Cir.1990) (striking down North Carolina's tax exemption for "Holy Bibles"); *Thayer v. South Carolina Tax Commission*, 413 S.E.2d 810 (S.C.1992) (striking down South Carolina's use tax exemption for religious publications); *but cf. Rojas v. Fitch*, 127 F.3d 184, 189 (1 st Cir.1997), *cert. denied*, 118 S.Ct. 2341 (1998) ("[w]e decline...to read Texas Monthly as requiring that a provision incidentally benefiting religion must grant a like benefit to every group that could also conceivably fall within the secular rationale for the exemption provision").[8]

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[8]In *Rojas*, the First Circuit upheld Rhode Island's exemption for religious employers from its mandatory unemployment compensation scheme, concluding that employees of religious organizations were included with other types of employees "whose employment patterns are irregular or whose wages are not easily accountable." *Rojas*, 127 F.3d at 188. The court determined that the overall secular purpose of this exemption was "reducing difficulties in administering an unemployment insurance program," and that "when a 'wide array' of groups are benefited by a provision that pursues a single, unifying, secular end, one of those groups may indeed be religious institutions." *Id.*

We question whether categorically placing employees of religious institutions with casual employees ostensibly for the secular purpose of administrative convenience is too contrived. Surely not all employees of religious organizations work irregular hours for irregular pay, and it is conceivable that an exemption for casual employees that was based on part- time status or hourly wages would better serve the purpose of administrative convenience while remaining religion-neutral. The First Circuit did not address this problem, and it is precisely the sort of difficulty that Justice Scalia indicated in his dissent in *Texas Monthly* — that courts would have to inquire too

(continued...)

We recognize that the dissenters below had reasonable grounds for contending that the Establishment Clause does not categorically prohibit legislation that *exclusively* benefits religious organizations because in some circumstances legislatively created exemptions that benefit religious organizations or religious practices have survived Establishment Clause challenges. *See Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987) (exemption of religious organizations from federal employment discrimination legislation upheld). However, where the exemption at issue is a tax exemption, and a religious organization benefits from that exemption, the *United States Supreme* Court has required that the tax exemption be sufficiently broad to encompass similar secular organizations. *See Texas Monthly, supra*. The Supreme Court appears to have been more skeptical of sales tax exemptions than other legislative exemptions that exclusively favor religion because sales tax exemptions are not needed to lift a significant restraint on religious activity, and they impose a "substantial burden" upon nonbeneficiaries by increasing their tax burden. *See Texas Monthly*, 489 U.S. at 18 n.8, 109 S.Ct. at 901 n.8. Regardless, our function is to apply the standard promulgated by the Court for analyzing religiously based tax exemptions, and to apply *Texas Monthly* to this case.

Turning to Pennsylvania's tax exemption, we find that it suffers from the same defects as the Texas exemption. The exemption pertains only to the "sale at retail or use of religious publications sold by religious groups and Bibles and religious articles." 72 P.S. § 7204(28). We find here the same preference

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[8](...continued)
deeply into whether religious organizations rationally fit within the broader class of nonreligious organizations who were exempt.

for communication of religious messages that the United States Supreme Court found violative of the Establishment Clause in *Texas Monthly*.[9] The same five Justices who endorsed a breadth of coverage analysis explicitly found Texas' similar exemption violative of the Establishment Clause,[10] and we are obliged to follow binding precedent on this federal constitutional issue.

Nor does the fact that the legislature has exempted a variety of unrelated items from the tax, ranging from caskets (72 P.S. § 7204(31)) to brook trout (72 P.S. § 7204(42)), save this particular exemption. Justice Brennan addressed this precise issue in *Texas Monthly*:

> [t]he fact that Texas grants other sales tax exemptions (e.g., for sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale) for different purposes does not rescue the exemption for religious

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[9]We note that this section also provides exemptions for newspapers (72 P.S. § 7204(30)), textbooks (72 P.S. § 7204(33)), and magazines (72 P.S. § 7204(50)), but not for other kinds of books or publications generally, which are taxed. These exemptions do not rescue the instant exemption, however, because unlike the religious publications exemption, these exemptions are content-neutral, and we can discern no broader secular purpose that would fairly encompass all these exemptions in a single scheme.

[10]*See Texas Monthly*, 489 U.S. at 25, 109 S.Ct. at 905 (Brennan, J., joined by Marshall and Stevens, JJ., setting forth the Court's holding in a plurality opinion, and stating, "We conclude that Texas' sales tax exemption for religious publications violates the First Amendment"); *Id.* at 29, 109 S.Ct. at 907 (Blackmun, J., joined by O'Connor, J., "concur[ring] in the holding that [the Texas statute] contravenes the Establishment Clause").

> periodicals from invalidation. What is critical is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups.

Texas Monthly, 489 U.S. at 15, n.4. Comparable to the deficient Texas exemption, Pennsylvania's exemption does not extend to publications by nonreligious groups, which are taxed, and therefore also lacks the requisite breadth for this to be anything but legislation intended solely to provide tax relief to religious organizations. Lacking a broader secular purpose, this exemption cannot survive an Establishment Clause challenge pursuant to the United States Supreme Court's holding in *Texas Monthly*.

We do not suggest that the Establishment Clause prohibits the Pennsylvania legislature from exempting religious publications from taxation. If the legislature does so in a way that benefits nonreligious publications equally with religious publications, and provided that there is an overall secular purpose, such an exemption would pass Establishment Clause scrutiny. Justice Brennan hinted at such a solution in *Texas Monthly*:

> [h]ow expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption. If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax

exemption we upheld in *Walz*.

489 U.S. at 15-16. Likewise, Justice Blackmun noted that there is room for the state to draft a sufficiently broad exemption that would include religious publications and simultaneously withstand Establishment Clause and Press Clause[11] challenges:

> [i]t is possible for a State to write a tax-exemption statute consistent with both [Establishment Clause and Free Exercise Clause] values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong. Such a statute, moreover, should survive Press Clause scrutiny because its exemption would be narrowly tailored to meet the compelling interests that underlie both the Free Exercise and Establishment Clauses.

Id. at 27-28. Indeed, the Texas legislature amended the tax exemption at issue in *Texas Monthly* by redrafting the statute to exempt literature based upon the type of organization that

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[11]The Press Clause challenge, raised by Appellees below but not addressed here, concerns the constitutionality of content-based tax exemptions for publications. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

produces it, as opposed to its content.[12] By classifying exempt items in this fashion, the Texas legislature has avoided giving preferential treatment to certain texts based solely on the messages that they contain, thus minimizing the potential for conflict with other First Amendment principles identified in Supreme Court jurisprudence. However, the tax exemption challenged here lacks the requisite breadth, and it is the role of the Pennsylvania legislature, and not the function of this Court, to remedy this deficiency.

Accordingly, we affirm the Commonwealth Court.

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[12]The Texas statute now reads: "Periodicals and writings that are published or distributed by a religious, philanthropic, charitable, historical, scientific, or other similar organization that is not operated for profit, but excluding an educational organization, are exempted from the taxes imposed by this chapter." Tex. Tax Code Ann § 151.312 (West 1992).

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

HENRY HALLER, FELICE NEWMAN, AND STEVE ZUPCIC, individuals,	:	
Petitioners	:	No. 241 M.D. 1993
v.	:	
THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, and EILEEN MCNULTY, SECRETARY OF THE DEPARTMENT OF REVENUE, in her official capacity,	:	ARGUED: November 15, 1995
Respondents	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE SANDRA SCHULTZ NEWMAN, Judge

OPINION BY JUDGE KELLEY[0] FILED: May 1, 1997

Presently before this court for disposition are the cross-motions for summary judgment filed by Felice Newman and Steve Zupcic (petitioners)[1] and the Pennsylvania Department of Revenue (department)[2] to the petition for review filed in our original jurisdiction by the petitioners. The petition for review raised a constitutional challenge to the department's enforcement of the sales tax exemption for the sale of religious articles, Bibles and other religious publications sold by religious organizations provided by section 204(28) of the Tax Reform Code of 1971 (Tax Code)[3] and section 31.3(22) of Title 61 of the Pennsylvania

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[1]This matter was reassigned to the author on December 10, 1996.

[2]Originally, Henry Haller was also a plaintiff in this case. However, he was subsequently dismissed as a party by this court based upon preliminary objections to the petition for review filed by the department and its Secretary, Eileen McNulty. *See* n. 3 infra.

[3]Eileen McNulty, the Secretary of the Department of Revenue at the time petitioners filed the petition for review, was also named as a defendant in her official capacity. We note that Robert A. Judge, Sr. has replaced McNulty as Secretary since the commencement of this action. *See* The Pennsylvania Manual, Vol. 112 (December 1995).

[4]Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7204(28). Section 204(28) reads as follows:

> The tax imposed by section 202 shall not be imposed upon * * *
>
> (28) The sale at retail or use of religious publications

(continued...)

Code (tax regulations)[4] [5] . Because we find that the foregoing tax exemptions violate both the United States and Pennsylvania Constitutions, the petitioners' motion for summary judgment is granted and the department's motion for summary judgment is denied.

The relevant facts of this case, as stipulated by the parties, are as follows. Newman owns and operates a publishing company, known as Cleis Press, located in Pittsburgh, Pennsylvania; none of the books published by Cleis Press are exempt from the foregoing sales tax. (Stipulation of Facts, Para. 6). During 1993, Zupcic purchased books of both a religious and non-religious nature from various stores in Pittsburgh. "Zupcic was not required to pay sales tax on the purchase of a [B]ible but was required to pay sales tax on other publications, both religious and non-religious, which were not published by a

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[4](...continued)
sold by religious groups and Bibles and religious articles.

[5]61 Pa.Code § 31.3(22). Section 31.3(22) reads as follows:

The tax does not apply to the following:

* * *

(22) Religious publications sold by religious groups. Sales or use of bibles and religious articles are exempt.

[6]The regulations contained at 61 Pa.Code § 31.3 were promulgated by the Department of Revenue pursuant to the authority granted to it by the General Assembly under section 270 of the Tax Code, 72 P.S. § 7270.

religious organization." (Stipulation of Facts, Para. 8). In addition, it was stipulated that the department "[h]as interpreted the term Bible as used in [section 204(28) of the Tax Code] in such a manner as to include the sacred texts of all religious groups, including such books as the Koran and the Book of Mormon." (Stipulation of Facts, Para. 9). The parties further stipulated that the department "[h]as not discriminated against any religious groups in its enforcement of [the exemption under section 204(28) of the Tax Code]." (Stipulation of Facts, Para. 10).

We initially note that a motion for summary judgment may be properly granted only in those cases where: (1) there is no outstanding issue of material fact; (2) the moving party's right to prevail is free from any doubt; and (3) the moving party is entitled to judgment as a matter of law. *Johnston v. Lehman*, 649 A.2d 730 (1994). Because the parties have stipulated to all material facts in this case, the only issues which need to be addressed are the legal issues concerning the constitutionality of the tax exemption for the sale of religious publications under section 204(28) of the Tax Code and section 31.3(22) of the tax regulations.

The petitioners first claim that they are entitled to judgment as a matter of law because the tax exemptions violate the Establishment Clause of the First Amendment to the United States Constitution, and Article 1, Section 3 of the Pennsylvania Constitution.[6] The First Amendment states, in pertinent part,

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[7]Article 1, Section 3 of the Pennsylvania Constitution reads as follows:

> All men have a natural and indefeasible right

(continued...)

[7](...continued)

> to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Pa. Const. art. 1, § 3.

Regarding the protections afforded by this provision, the Pennsylvania Supreme Court has noted that:

> The principles enunciated in this part of our Constitution reflected a concern for the protection of the religious freedoms of Pennsylvanians long before the first amendment to the United States Constitution was made applicable to the states through the fourteenth amendment. Provisions identical to the above section were contained in the Constitutions of 1790 and 1838 and a similar provision was contained in the Constitution of 1776.... The protection of rights and freedoms secured by this section of our Constitution, however, does not transcend the protection of the first amendment of the United States Constitution.

Wiest v. Mt. Lebanon School District, 457 Pa. 166, 174, 320 A.2d 362, 366-67 (1974). As a result, the analysis petitioners' claim under the first amendment to the United States Constitution is "equally apposite" to their claim raised under article 1, section 3 of the

(continued...)

that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." U.S. Const. amend. I.

Regarding the purpose underlying the adoption of the Establishment Clause, the Supreme Court has noted that:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed ... that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any

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[7](...continued)
Pennsylvania Constitution. *Id.*, 457 Pa. at 174, 320 A.2d at 367. *See also Springfield School District v. Department of Education*, 483 Pa. 539, 397 A.2d 1154 (1979) (quoting *Wiest*). *Cf. Fischer v. Department of Public Welfare*, 66 Pa.Cmwlth. 70, 444 A.2d 774, 780-81 (1982) (Craig, J., Opinion in Support of Overruling Preliminary Objections) ("[T]he decisions of the appellate courts of this Commonwealth contain numerous examples of the general proposition that the Pennsylvania Constitution may afford greater protections than that of its federal counterpart ... [i]n view of the fact that the present [challenge] is also grounded upon [Article 1, Section 3 of] the Pennsylvania Constitution [the decision of the United States Supreme Court with respect to the same legislative enactment] is not controlling precedent ....") (citations omitted).

> other establishment in all cases whatsoever." ... The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of [its] taxing and spending power....

Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (citations and footnotes omitted).

In support of their claim that the tax exemptions are unconstitutional, the petitioners principally rely on the Supreme Court's opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). In that case, the Supreme Court considered whether a similar tax exemption for the sale of religious publications by religious organizations enacted by the Texas Legislature violated the Establishment Clause. The statute in question, Tex.Tax Code § 151.312 (1982), exempted from taxation "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." *Texas Monthly, Inc.*, 489 U.S. at 5.

Writing for a plurality Court, Justice Brennan noted that:

> In proscribing all laws "respecting an establishment of religion," the Constitution prohibits, at the very least, legislation that

> constitutes an endorsement of one or another set of religious beliefs or of religion generally. It is part of our settled jurisprudence that "the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." ... The core notion animating the requirement that a statute possess "a secular legislative purpose" and that "its principal or primary effect ... be one that neither advances nor inhibits religion," ... is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

Id. at 8-9 (Brennan, J., plurality) (citations and footnote omitted).

However, Justice Brennan noted that government policies with secular objectives which may incidentally benefit religion are not violative of the First Amendment prohibition. *Id.* at 10. Rather, the First Amendment is offended only where the benefits of governmental policies flow solely to aid religion, thereby creating the appearance of state sponsorship of religion. *Id.* at 11.

In defense of the sales tax exemption for religious publications, Texas argued that without such an exemption, its sales tax might violate the Free Exercise Clause of the First

Amendment. *Id.* at 17. In addition, Texas argued that the sales tax exemption neither advanced nor inhibited religion, as required by the Establishment Clause, and its elimination would entangle church and state to a greater degree than the exemption itself. *Id.*

However, as the plurality opinion stated:

> We reject both parts of this argument. Although Texas may widen its exemption consonant with some legitimate secular purpose, nothing in our decisions under the Free Exercise Clause prevents the State from eliminating altogether its exemption for religious publications. "It is virtually self- evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."

Id. at 18. In that case, Texas had presented no evidence that the payment of sales tax by the purchasers of religious materials would offend their religious beliefs or inhibit religious activity. *Id.* Thus, the plurality opinion concluded, Texas could not persuasively claim that the sales tax exemption for religious materials was compelled by the Free Exercise Clause. *Id.*

The plurality opinion also stated:

> Texas' further claim that the Establishment Clause mandates or at least favors its sales tax exemption for religious periodicals is equally unconvincing. Not only does the

> exemption seem a blatant endorsement of religion, but it appears, on its face, to produce greater state entanglement with religion than the denial of an exemption.

Id. at 20. Thus, the plurality opinion ultimately concluded that Texas' sales tax exemption for religious publications violated the First Amendment. *See id.* at 21-25.

Clearly, the statute in question in *Texas Monthly, Inc.* was quite similar to the one under scrutiny in the instant matter. However, the department argues that because Justice Brennan's plurality opinion failed to garner a majority of the Justices who agreed both upon the result and the underlying rationale for that result, we should not follow that decision as binding precedent in ruling on the instant motions for summary judgment. *See, e.g., CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69 (1987) (The reasoning of a plurality opinion which does not represent the views of a majority of the Court is not binding on the Court).[7] Rather, the department argues that the Supreme Court's opinion in *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970) should control our disposition of the instant motions.

In *Walz*, the Supreme Court considered whether a tax exemption for the real property of religious organizations contained in Article 16, Section 1 of the New York Constitution violated the Establishment Clause. The relevant constitutional provision stated, in pertinent part:

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[7]However, some courts have relied exclusively on *Texas Monthly, Inc.* to find a violation of the Establishment Clause. *See, e.g., Finlator v. Powers*, 902 F.2d 1158 (4th Cir.1990); *Thayer v. South Carolina Tax Commission*, 307 S.C. 6, 413 S.E.2d 810 (1992).

> 'Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.'

Walz, 397 U.S. at 666.

This constitutional provision was implemented through section 420 of the New York Real Property Tax law which stated, in pertinent part:

> Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes ... and used exclusively for carrying out thereupon one or more of such purposes ... shall be exempt from taxation as provided in this section.

Id. The Supreme Court ultimately upheld the foregoing real property exemption because it was a reasonable accommodation to religion as required by the Free Exercise Clause, and such an exemption was rooted in both prior case law and a historical tradition of exempting such real properties from taxation which stretched back to the inception of our nation. *See, Id.* at 674-80.

However, in considering whether such an exemption violated the Establishment Clause, the Supreme Court noted that:

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.

Id. at 672-73.

The Supreme Court also acknowledged that:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure the

> end result--the effect--is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement....

Id. at 674-75. Relying on the historical exemption from taxation accorded to places of worship, its widespread application throughout the country, and the lack of government involvement in its administration, the Supreme Court ultimately concluded that the exemption relating to real property did not violate the Religion Clauses of the First Amendment. *Id.* at 676-80.

We believe that the sales tax exemption under review in this case is quite distinct from the New York property tax exemption which was upheld by the Supreme Court in *Walz*. It is one thing for a state to exempt from taxation the real property owned by a religious organization which is used exclusively for

religious worship. It is quite a different matter for a state to exempt from taxation tangible personal property of a religious nature which is sold at retail. The former practice is found in every state of this country, and it has existed since the founding of this country. *See Walz*. The latter practice possesses neither the historical pedigree nor the widespread approval of the former.

Moreover, the tax exemption for real property owned by religious organizations which was upheld in *Walz* was part of a general tax exemption which was accorded to a large number of other various nonprofit institutions. *See Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) ("[I]n *Walz* we held that a tax exemption for 'religious organizations for religious properties used solely for religious worship,' as part of a general exemption for nonprofit institutions, [d]id not violate the Establishment Clause.") (citation omitted and emphasis added). *See also Texas Monthly, Inc.*, 489 U.S. at 15 n. 5 (Brennan, J., plurality) ("Not only did the property tax exemption sustained in *Walz* [e]xtend to a large number of nonreligious organizations that ostensibly served an expressly articulated secular objective that religious groups could reasonably be thought to advance as well; it also failed to single out religious proselytizing as an activity deserving of public assistance.") (emphasis added). *But cf. id.* at 38 (Scalia, J., dissenting) ("[In *Walz*, t]he Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion as an exemption for religion.").

The tax exemptions under scrutiny in the instant case are not so all-encompassing; they relate solely to items of a religious nature which, in some circumstances, are sold by religious organizations. We believe the patent differences between the instant tax exemptions and the one which was upheld in *Walz*

demonstrate that they are, both logically and legally, quite distinct.

Rather, we believe that the Supreme Court's opinion in *Jimmy Swaggart Ministries* is more instructive in resolving the instant motions for summary judgment. In that case, the Supreme Court considered the constitutionality of the sales and use tax statute in California. Under Cal.Rev. & Tax.Code § 6051 (West 1987), retailers in the state are required to pay a sales tax "[f]or the privilege of selling tangible personal property at retail." *Jimmy Swaggart Ministries*, 493 U.S. at 381. As a complement to this sales tax, Cal.Rev. & Tax.Code § 6201 imposes a use tax to reach out-of-state purchases by California residents which is "imposed on the storage, use, or other consumption in [California] of tangible personal property purchased from any retailer". *Id.* Although the use tax is imposed on the purchaser, it is generally collected by the retailer at the time the sale is made. *Id.* Unlike the Tax Code in Pennsylvania, neither the California Constitution nor the California sales and use tax statutes exempt religious organizations from the sales and use taxes, apart from a limited exemption for the serving of meals by those organizations. *Id.*

For a seven-year period, Jimmy Swaggert Ministries conducted numerous evangelistic crusades across the United States, including California, which services were recorded for later sale or broadcast. *Id.* at 382. Religious books, tapes, records, and other religious and nonreligious merchandise were sold by this organization at these crusades. *Id.*

In addition, the organization published a monthly magazine which was sold nationwide by subscription, and contained advertisements for religious books, tapes, and records. *Id.* The magazine included an order form listing the various

items for sale in that issue by which consumers could purchase the items. *Id.* Items were also offered for sale through radio, television, and cable television broadcasts, including broadcasts emanating from local California television stations. *Id.*

California notified the organization that its sale of religious materials was not exempt from the California sales tax, and requested the organization to register as a seller to facilitate the reporting and payment of that tax. *Id.* The organization responded to the request and asserted that it was exempt from the sales and use tax under the First Amendment. *Id.* Subsequently, the organization was audited by the California Board of Equalization and advised that it should register as a seller and report and pay sales tax on all sales made at the crusades conducted in California. *Id.* at 382-83.

On appeal to the Supreme Court, the organization argued that California's imposition of the sales and use tax on its sale of religious materials violated both the Free Exercise and Establishment Clauses of the First Amendment. *Id.* at 384. In arguing that the tax violated the Free Exercise Clause, the organization principally relied on the Supreme Court's opinions in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944). *Id.* at 385-86. In those cases, the Supreme Court had invalidated, under the Free Exercise Clause, the imposition of flat license taxes which served as a precondition to conducting evangelistic activities because the taxes operated as a prior restraint on the exercise of religious liberty. *Id.*

A unanimous Supreme Court rejected the organization's Free Exercise claim, and declined to adopt its expansive reading of *Murdock* and *Follett*, stating that:

> [O]ur concern in Murdock and Follett — that a flat license tax would act as a precondition to the free exercise of religious beliefs — is simply not present where a tax applies to all sales and uses of tangible personal property in the State.

Id. (emphasis in original).

The Supreme Court also acknowledged its prior decision in *Texas Monthly, Inc.*, stating:

> We also note that just last Term a plurality of the Court rejected the precise argument appellant now makes. In Texas Monthly, Inc..... Justice BRENNAN, writing for three Justices, held that a state sales tax exemption for religious publications violated the Establishment Clause. *Id.*, at 14-21 ... In so concluding, the plurality further held that the Free Exercise Clause did not prevent the State from withdrawing its exemption, noting that "[t]o the extent that our opinions in Murdock and Follett might be read ... to suggest that the States and the Federal Government may never tax the sale of religious or other publications, we reject those dicta. *Id.*, at 24 ... Justice WHITE, concurring in the judgment, concluded that the exemption violated the Free Press Clause because the content of a publication determined its tax-exempt status. *Id.*, at 24-25 ... Justice BLACKMUN, joined by Justice O'CONNOR, concurred in the plurality's holding that the tax exemption at issue in that case contravened the Establishment Clause, but reserved the question

whether "the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of Follett and Murdock may be left for another day." *Id.*, at 28 ... In this case, of course, California has not chosen to create a tax exemption for religious materials, and we therefore have no need to revisit the Establishment Clause question presented in Texas Monthly.

We do, however, decide the Free Exercise question left open by Justice BLACKMUN's concurrence in Texas Monthly by limiting Murdock and Follett to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs. As such, Murdock and Follett plainly do not support appellant's free exercise claim. California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or purchaser is charitable, religious, nonprofit, or state or local governmental in nature ... Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs per se; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, California treats the sale of a Bible by a religious organization just as it would treat the sale of a

> Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

Id. at 388-90.

The organization in *Jimmy Swaggart Ministries* also argued that the imposition of the California sales tax violated the Establishment Clause because it fostered "an excessive government entanglement with religion" as prohibited by *Walz*. *Id.* at 392. The Supreme Court squarely rejected this claim, stating that:

> The Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz, supra, at 668 ... [I]n Walz we held that a tax exemption for "religious organizations for religious properties used solely for religious worship," as part of a general exemption for nonprofit institutions, id., at 666-667 ... did not violate the Establishment Clause. In upholding the tax exemption, we specifically noted that taxation of religious properties would cause at least as much administrative entanglement between government and religious authorities as did the exemption ... The issue presented, therefore, is whether the imposition of sales and use tax liability in this case on appellant results in "excessive" involvement between

> appellant and the State and "continuing surveillance leading to an impermissible degree of entanglement."
>
> At the outset, it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief. Thus, whatever the precise contours of the Establishment Clause, ... its undisputed core values are not even remotely called into question by the generally applicable tax in this case.
>
> [W]e hold that California's imposition of sales and use tax liability on appellant threatens no excessive entanglement between church and state....

Id. at 393-94 (citations omitted). Thus, the Supreme Court concluded that the generally applicable sales tax which was neutrally imposed on the sale of religious items by the organization violated neither the Free Exercise Clause nor the Establishment Clause of the First Amendment. *Id. See also Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance*, 463 N.W.2d 76 (Iowa 1990) (The State's assessment of a consumer use tax on the Church's use of consumer items under a generally applicable sales and use tax violates neither the Free Exercise Clause nor the Press Clause of the First Amendment citing, *inter alia*, *Jimmy Swaggart Ministries*).

Based on the foregoing, we are persuaded that the tax exemptions under scrutiny in this case violate both the First

Amendment to the United States Constitution and Article 1, Section 3 of the Pennsylvania Constitution. Clearly, under *Jimmy Swaggart Ministries*, the Free Exercise Clause does not require these exemptions, and the collection of tax from these sales would not involve "an excessive government entanglement with religion" as prohibited by the Establishment Clause.

Because the instant exemptions are based solely on the religious nature of the items sold or the entity selling them, and because such an exemption is not required by the Free Exercise Clause, we find that they violate the Establishment Clause of the First Amendment to the United States Constitution and Article 1, Section 3 of the Pennsylvania Constitution. As a result, the petitioners are entitled to judgment as a matter of law, and we grant their motion for summary judgment on these grounds. The department's motion for summary judgment is denied.

Judge Newman did not participate in the decision in this case.

ORDER

NOW, this 1st day of May, 1997, the motion for summary judgment of Felice Newman and Steve Zupcic is hereby granted, and the motion for summary judgment of the Department of Revenue is denied. Section 204(28) of the Tax Reform Code of 1971 and section 31.3(22) of Title 61 of the Pennsylvania Code are declared to be violative of the First Amendment to the United States Constitution and Article 1, Section 3 of the Pennsylvania Constitution, and their enforcement is hereby enjoined.

DISSENTING OPINION BY JUDGE DOYLE

Because I believe that the sales tax exemption does not violate the Establishment Clause of the First Amendment to the

United States Constitution but, rather, respects the desired separation between church and state, I dissent.

In holding that the sales tax exemption violates the Establishment Clause, the majority relies upon the plurality opinion of the United States Supreme Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). I disagree that that decision controls the outcome of this case.

Justice Brennan wrote the plurality decision in Texas Monthly on behalf of himself and Justices Marshall and Stevens. Under the "traditional" three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), he found the tax exemption to be unconstitutional because it lacked a secular purpose and because it favored "religious belief in general." *Texas Monthly*, 489 U.S. at 9 (Brennan, J., plurality).

Justice Blackmun wrote a separate opinion, concurring in the result, which was joined by Justice O'Connor. Although reaching the same result as Justice Brennan under the facts of that particular case, and concluding that "the Establishment Clause prohibits a tax exemption limited to the sale of religious literature," *Id.* at 29 (Blackmun, J., concurring in result), it is significant that Justice Blackmun did *not* accept the same rationale as Justice Brennan. Justice Blackmun was particularly critical of what he viewed as Justice Brennan's attempt to subordinate the Free Exercise Clause to the values embodied in the Establishment Clause. *Texas Monthly*, 489 U.S. at 27 (Blackmun, J., concurring). Justice Blackmun's cursory treatment of the subject does not provide much guidance as to his thinking beyond the fact that he believes the Texas statute violates the Establishment Clause, and that he favors a very "narrow resolution of the case." *Id.* at 28.

Justice White also concurred in the result, writing yet another concurring opinion, in which he based his conclusion, not on his interpretation of the Establishment Clause, but instead on his belief that the Texas statute infringed upon the Press Clause.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, dissented and would have upheld the Texas statute, relying on the Supreme Court's earlier decision in *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970).

Thus, the opinions written by the Supreme Court in *Texas Monthly* in favor of striking down the sales tax exemption are made up of three Justices (Justice Brennan's plurality opinion) who would find that the statute violates the Establishment Clause under the *Lemon* test; a single Justice (Justice White's concurring opinion) who believes the statute violates only the Press Clause; and two Justices (Justice Blackmun's concurring opinion) who, although believing the statute should be struck down under the Establishment Clause, provide no more than a cursory explanation for this conclusion. I am unable to ascertain much, if anything, concerning the rationale underlying Justice Blackmun's opinion beyond the fact that he does not agree with Justice Brennan's or Justice White's rationale on the subject. Thus, because *Texas Monthly* has not garnered a majority of Justices who agreed upon both the result, as well as the underlying rationale for that result, that decision is not binding precedent.

To determine the precedential value of a United States Supreme Court decision where a majority of the Court does not agree on a single rationale, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment[ ] on the narrowest grounds." *Marks v. United*

States, 430 U.S. 188, 193 (1977). When the reasoning of a plurality opinion does not represent the views of a majority of the Court, the opinion is not binding. *See CTS Corporation v. Dynamics Corporation of America*, 481 U.S. 69. I conclude, therefore, that the opinions in *Texas Monthly* are so splintered that it is impossible to find sufficient common ground between them with which to determine the *ratio decidendi* of the Court.

In the present case, the majority acknowledges the contention that *Texas Monthly* should not be followed as binding precedent, but it then fails to discuss the argument. The majority never offers what it believes to be the Supreme Court's common underlying rationale for finding that the sales tax exemption violated the Establishment Clause.

Remaining unconvinced that *Texas Monthly* articulates a common rationale for striking down the sales tax exemption under the Establishment Clause, I find that *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970), which was adopted by a clear majority of the Supreme Court, is binding upon this Court in resolving the case presently before us.

I disagree with the majority that *Walz* is factually distinguishable from the instant matter. I find irrelevant the distinction between the two kinds of tax exemptions because, in deciding their constitutionality, the subject matter of the tax is, or should be, of absolutely no consequence.

Additionally, I disagree with the majority that the tax exemption in *Walz* was upheld because it encompassed secular nonprofit organizations as well as religious ones. Rather, I find, as did Justice Scalia in *Texas Monthly*, that the *Walz* Court concluded that the statute had a valid legislative purpose solely because it sought to guard against the "latent dangers" of

government hostility toward religion "inherent in the imposition of property taxes." *Walz*, 397 U.S. at 673; *Texas Monthly* at 36, (Scalia, J., dissenting).

In fact, the *Walz* Court explicitly stated, "We find it unnecessary to justify the tax exemption on the social welfare services of "good works" that some churches perform for parishioners and others...." *Id.* at 674. The Court explained that, because the policy of "benevolent neutrality" by the government toward religion seeks to minimize the "day-to-day relationship" between the two entities, "the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." *Id.* As Justice Scalia explained in his dissent in *Texas Monthly*, the Supreme Court stated in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), that the Court "'has never indicated that statutes that give special consideration to religious groups are per se invalid.'" *Texas Monthly*, 489 U.S. at 39 (Scalia, J., dissenting) (emphasis added).

The *Walz* Court recognized that the granting of tax exemptions historically reflect the concern that "[g]overnments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms...." *Walz*, 397 U.S. at 673. The Court explained that the tax exemption was therefore not meant to sponsor religious activity but to "restrict[ ] the fiscal relationship between church and state" and to "complement and reinforce the desired separation insulating from each other." *Id.* at 676 (emphasis added). Thus, the Court concluded that the legislative purpose of the property tax exemption is "neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." *Id.* at 672.

The *Walz* Court further explained that the tax exemption did not have the primary effect of sponsoring religious activity because, although a tax exemption may have the same economic effect as a state subsidy, it concluded that such "indirect economic benefit" is significantly different for Establishment Clause purposes. The Court stated, "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.... There is no genuine nexus between tax exemption and establishment of religion." *Walz*, 397 U.S. at 675 (emphasis added).

Likewise, the Court determined that the tax exemption did not produce excessive government entanglement with religion. It stated that the tax exemption created only a minimal and remote involvement between church and state, far less than taxation would actually entail. Indeed, the *Walz* Court rejected "the use of a social yardstick," as discussed above, as an element to qualify for tax exemption, because it would involve excessive government entanglement with religion.

In my view, the *Walz* decision is dispositive of the instant claim because the facts and analysis are exactly on point, and because *Texas Monthly* is not binding upon us. As in *Walz*, by creating the sales tax exemption, the Commonwealth in this case is abstaining from demanding that religious groups support the state. As such, the Commonwealth is merely "restricting the fiscal relationship between the church and state, and, by doing so, "complement[s] ... the desired separation" that "insulates" one from the other. Therefore, the exemption neither advances nor sponsors religion. Rather, by enacting the tax exemption, the Commonwealth recognizes that "the government may (and sometimes must) accommodate religious practices and it may do so without violating the Establishment Clause." *Texas Monthly*,

489 U.S. at 38 (Scalia, J., dissenting) (emphasis added).

Finally, I reject the majority's reliance upon *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990). The majority concludes that because the Supreme Court in that case held that a generally applicable sales tax that was neutrally imposed on the sale of all tangible personal property, including religious items, did not violate the *Free Exercise Clause*, therefore, a sales tax *exemption* for religious items *must* violate the *Establishment Clause*. The *Jimmy Swaggart Ministries* decision simply does not support such a conclusion.

To the contrary, the Supreme Court did not hold in *Jimmy Swaggart Ministries* that the imposition of a generally applicable sales tax did not violate the Establishment Clause *because* such a tax did *not* violate the Free Exercise Clause. Rather, the Court determined that the tax was constitutional because it threatened no excessive entanglement between church and state. *See Jimmy Swaggart Ministries*, 493 U.S. at 397. In fact, the Court stated that it has "no need to revisit the Establishment Clause question presented in *Texas Monthly*." *Jimmy Swaggart Ministries*, 493 U.S. at 389. It is noteworthy that in Texas Monthly, Justice Brennan's conclusion that the tax exemption violated the Establishment Clause did not depend upon a finding that the Free Exercise Clause does not mandate that the sales tax be imposed. Rather, he found the exemption unconstitutional solely because it lacked a secular purpose and favored "religious belief in general."

Thus, the *Jimmy Swaggart Ministries* Court analyzed the Establishment and the Free Exercise Clauses independently of one another, and it refused to apply its holding to the facts under *Texas Monthly*. Indeed, my review of the case law has revealed

no decision where the Supreme Court has held that, if a state's action does not violate the Free Exercise Clause, then it automatically violates the Establishment Clause. I daresay none exists for good reason.

In my view, the Supreme Court has created a "neutral zone" where one state may exempt from tax the sale of religious articles without running afoul of the Establishment Clause, and yet, nonetheless, another state may impose a tax on the sale of all goods, *including* religious articles, without running constitutionally afoul of the Free Exercise Clause. There is a "buffer zone," so to speak, where the friction, or "tension," as Justice Blackmun explained in his concurring opinion in *Texas Monthly*, between the Establishment Clause and the Free Exercise Clause is alleviated, and which allows each fundamental right to co-exist in harmony and mutual respect.

I also find the majority's conclusion contrary to the tradition of exemption of religion, recognized by the *Walz* Court, from various taxes before, during and after the framing of the First Amendment's Religion Clauses. As the Supreme Court stated in *Walz*, "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Walz*, 397 U.S. at 676- 77 (emphasis added).

I believe the majority's holding is contrary to the established jurisprudence of this nation so clearly articulated by Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306 (1952):

We make room for as wide a variety of beliefs

> and creeds as the spiritual needs of man deem necessary.... When the state encourages religious instruction ... it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Id. at 313-14.

In summary, I do not believe that the Commonwealth of Pennsylvania is constitutionally prohibited from taxing secular publications and exempting religious ones, and would grant summary judgment in favor of the Department.

Judge Smith joins in this dissenting opinion.

PURDON'S PENNSYLVANIA STATUTES
ANNOTATED
TITLE 72. TAXATION AND FISCAL AFFAIRS
CHAPTER 5. TAX REFORM CODE OF 1971

§ 7202 Imposition of tax

(a) There is hereby imposed upon each separate sale at retail of tangible personal property ... within this Commonwealth, a tax of six per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth as herein provided.

(b) There is hereby imposed upon the use ... within this Commonwealth of tangible personal property purchased at retail ... a tax of six per cent of the purchase price, which tax shall be paid to the Commonwealth by the person who makes such use as herein provided....

* * * * *

§ 7204. Exclusions from tax

The tax imposed by section [7202] shall not be imposed upon

(1) The sale at retail or use of tangible personal property (other than motor vehicles, trailers, semi-trailers, motor boats, aircraft or other similar tangible personal property required under either Federal law or laws of this Commonwealth to be registered or licensed) or services sold by or purchased from a person not a vendor in an isolated transaction or sold by or purchased from a person who is a vendor but is not a vendor with respect to the tangible personal property or services sold or purchased in such

transaction: Provided, That inventory and stock in trade so sold or purchased, shall not be excluded from the tax by the provisions of this subsection.

(2) The use of tangible personal property purchased by a nonresident person outside of, and brought into this Commonwealth for use therein for a period not to exceed seven days, or for any period of time when such nonresident is a tourist or vacationer and, in either case not consumed within the Commonwealth.

(3) The use of tangible personal property purchased outside this Commonwealth for use outside this Commonwealth by a then nonresident natural person or a business entity not actually doing business within this Commonwealth, who later brings such tangible personal property into this Commonwealth in connection with his establishment of a permanent business or residence in this Commonwealth: Provided, That such property was purchased more than six months prior to the date it was first brought into this Commonwealth or prior to the establishment of such business or residence, whichever first occurs. This exclusion shall not apply to tangible personal property temporarily brought into Pennsylvania for the performance of contracts for the construction, reconstruction, remodeling, repairing and maintenance of real estate.

(4) The sale at retail or use of disposable diapers; pre-moistened wipes; incontinence products; colostomy deodorants; toilet paper; sanitary napkins, tampons or similar items used for feminine hygiene; or toothpaste, toothbrushes or dental floss.

(5) The sale at retail or use of steam, natural and manufactured and bottled gas, fuel oil, electricity or intrastate subscriber line charges, basic local telephone service or telegraph

service when purchased directly by the user thereof solely for his own residential use and charges for telephone calls paid for by inserting money into a telephone accepting direct deposits of money to operate.

(6) to (9). Deleted. 1991, Aug. 4, P.L. 97, No. 22, § 3, imd. effective.

(10) The sale at retail to or use by (i) any charitable organization, volunteer firemen's organization or nonprofit educational institution, or (ii) a religious organization for religious purposes of tangible personal property or services other than pursuant to a construction contract: Provided, however, That the exclusion of this clause shall not apply with respect to any tangible personal property or services used in any unrelated trade or business carried on by such organization or institution or with respect to any materials, supplies and equipment used and transferred to such organization or institution in the construction, reconstruction, remodeling, renovation, repairs and maintenance of any real estate structure, other than building machinery and equipment, except materials and supplies when purchased by such organizations or institutions for routine maintenance and repairs.

(11) The sale at retail, or use of gasoline and other motor fuels, the sales of which are otherwise subject to excise taxes under the act of May 21, 1931 (P.L. 194), known as the "Liquid Fuels Tax Act," and the act of January 14, 1952 (P.L.1965), known as the "Fuel Use Tax Act."

(12) The sale at retail to, or use by the United States, this Commonwealth or its instrumentalities or political subdivisions of tangible personal property or services.

(13) The sale at retail, or use of wrapping paper, wrapping twine, bags, cartons, tape, rope, labels, nonreturnable containers and all other wrapping supplies, when such use is incidental to the delivery of any personal property, except that any charge for wrapping or packaging shall be subject to tax at the rate imposed by section 202.

(14) Sale at retail or use of vessels designed for commercial use of registered tonnage of fifty tons or more when produced by the builders thereof upon special order of the purchaser.

(15) Sale at retail of tangible personal property or services used or consumed in building, rebuilding, repairing and making additions to or replacements in and upon vessels designed for commercial use of registered tonnage of fifty tons or more upon special order of the purchaser, or when rebuilt, repaired or enlarged, or when replacements are made upon order of or for the account of the owner.

(16) The sale at retail or use of tangible personal property or services to be used or consumed for ship cleaning or maintenance or as fuel, supplies, ships' equipment, ships' stores or sea stores on vessels designed for commercial use of registered tonnage of fifty tons or more to be operated principally outside the limits of the Commonwealth.

(17) The sale at retail or use of prescription or non-prescription medicines, drugs or medical supplies, crutches and wheelchairs for the use of cripples and invalids, artificial limbs, artificial eyes and artificial hearing devices when designed to be worn on the person of the purchaser or user, false teeth and materials used by a dentist in dental treatment, eyeglasses when especially designed or prescribed by an ophthalmologist, oculist

or optometrist for the personal use of the owner or purchaser and artificial braces and supports designed solely for the use of crippled persons or any other therapeutic, prosthetic or artificial device designed for the use of a particular individual to correct or alleviate a physical incapacity, including but not limited to hospital beds, iron lungs, and kidney machines.

(18) The sale at retail or use of coal.

(19) to (23). Deleted. 1991, Aug. 4, P.L. 97, No. 22, § 3, imd. effective.

(24) The sale at retail or use of motor vehicles, trailers and semitrailers, or bodies attached to the chassis thereof, sold to a nonresident of Pennsylvania to be used outside of Pennsylvania and which are registered in a state other than Pennsylvania within twenty days after delivery to the vendee.

(25) The sale at retail or use of water.

(26) The sale at retail or use of all vesture, wearing apparel, raiments, garments, footwear and other articles of clothing worn or carried on or about the human body but all accessories, ornamental wear, formal day or evening apparel, and articles made of fur on the hide or pelt or any material imitative of fur and articles of which such fur, real, imitation or synthetic, is the component material of chief value, but only if such value is more than three times the value of the next most valuable component material, and sporting goods and clothing not normally used or worn when not engaged in sports shall not be excluded from the tax.

(27) Deleted by amendment. 1983, July 21, P.L. 63, No. 29, § 1, effective in 15 days.

(28) The sale at retail or use of religious publications sold by religious groups and Bibles and religious articles.

(29) The sale at retail or use of food and beverages for human consumption, except that this exclusion shall not apply with respect to--

(i) Soft drinks;

(ii) Malt and brewed beverages and spirituous and vinous liquors;

(iii) Food or beverages, whether sold for consumption on or off the premises or on a "take-out" or "to go" basis or delivered to the purchaser or consumer, when purchased (A) from persons engaged in the business of catering; or (B) from persons engaged in the business of operating establishments from which ready-to-eat food and beverages are sold, including, but not limited to, restaurants, cafes, lunch counters, private and social clubs, taverns, dining cars, hotels, night clubs, fast food operations, pizzerias, fairs, carnivals, lunch carts, ice cream stands, snack bars, cafeterias, employe cafeterias, theaters, stadiums, arenas, amusement parks, carryout shops, coffee shops and other establishments whether mobile or immobile. For purposes of this clause, a bakery, a pastry shop, a donut shop, a delicatessen, a grocery store, a supermarket, a farmer's market, a convenience store or a vending machine shall not be considered an establishment from which food or beverages ready to eat are sold except for the sale of meals, sandwiches, food from salad bars, hand- dipped or hand-served iced based products including ice cream and yogurt, hot soup, hot pizza and other hot food items, brewed coffee and hot beverages. For purposes of this subclause, beverages shall not include malt and brewed beverages and spirituous and vinous liquors but shall include soft

drinks. The sale at retail of food and beverages at or from a school or church in the ordinary course of the activities of such organization is not subject to tax.

(30) The sale at retail or use of newspapers. For purposes of this section, the term "newspaper" shall mean a "legal newspaper" or a publication containing matters of general interest and reports of current events which qualifies as a "newspaper of general circulation" qualified to carry a "legal advertisement" as those terms are defined in 45 Pa.C.S. § 101 (relating to definitions), not including magazines. This exclusion shall also include any printed advertising materials circulated with such newspaper regardless of where or by whom such printed advertising material was produced.

(31) The sale at retail or use of caskets and burial vaults for human remains and markers and tombstones for human graves.

(32) The sale at retail or use of flags of the United States of America and the Commonwealth of Pennsylvania.

(33) The sale at retail or use of textbooks for use in schools, colleges and universities, either public or private when purchased in behalf of or through such schools, colleges or universities provided such institutions of learning are recognized by the Department of Education.

(34) The sale at retail, or use of motion picture film rented or licensed from a distributor for the purpose of commercial exhibition.

(35) The sale at retail or use of mail order catalogs and direct mail advertising literature or materials, including electoral

literature or materials, such as envelopes, address labels and a one-time license to use a list of names and mailing addresses for each delivery of direct mail advertising literature or materials, including electoral literature or materials, through the United States Postal Service.

(36) The sale at retail or use of rail transportation equipment used in the movement of personalty.

(37) The sale at retail of buses to be used under contract with school districts that are replacements for buses destroyed or lost in the flood of 1977 for a period ending December 31, 1977 in the counties of Armstrong, Bedford, Cambria, Indiana, Jefferson, Somerset and Westmoreland, or the use of such buses.

(38) The sale at retail of horses, if at the time of purchase, the seller is directed to ship or deliver the horse to an out-of-State location, whether or not the charges for shipment are paid for by the seller or the purchaser; the seller shall obtain a bill of lading, either from the carrier or from the purchaser, who, in turn has obtained the bill of lading from the carrier, reflecting delivery to the out-of-State address to which the horse has been shipped. The seller shall execute a "Certificate of Delivery to Destination Outside of the Commonwealth" for each bill of lading reflecting out-of-State delivery. The seller shall be required to retain the certificate of delivery form to justify the noncollection of sales tax with respect to the transaction to which the form relates.

In transactions where a horse is sold by the seller and delivered to a domiciled person, agent or corporation prior to its being delivered to an out- of-State location, the "Certificate of Delivery to Destination Outside of the Commonwealth" form must have attached to it bills of lading both for the transfer to the domiciled person, agent or corporation and from the aforementioned to the

out-of-State location.

(39) The sale at retail or use of fish feed purchased by or on behalf of sportsmen's clubs, fish cooperatives or nurseries approved by the Pennsylvania Fish Commission.

(40) The sale at retail of supplies and materials to tourist promotion agencies, which receive grants from the Commonwealth, for distribution to the public as promotional material or the use of such supplies and materials by said agencies for said purposes.

(41) The sale at retail of supplies and materials to tourist promotion agencies, which receive grants from the Commonwealth, for distribution to the public as promotional material or the use of such supplies and materials by said agencies for said purposes.

(42) The sale or use of brook trout (salvelinus fontinalis), brown trout (Salmo trutta) or rainbow trout (Salmo gairdneri).

(43) The sale at retail or use of buses to be used exclusively for the transportation of children for school purposes.

(44) The sale at retail or use of firewood. For the purpose of this clause, firewood shall mean the product of trees when severed from the land and cut into proper lengths for burning and used for fuel for cooking, hot water production or to heat residential dwellings.

(45) The sale at retail or use of materials used in the construction and erection of objects purchased by not-for-profit organizations for purposes of commemoration and memorialization of historical events, provided that the object is

erected upon publicly owned property or property to be conveyed to a public entity upon the commemoration or memorialization of the historical event.

(46) The sale at retail or use of tangible personal property purchased in accordance with the Food Stamp Act of 1977, as amended (Public Law 95-113, 7 U.S.C. §§ 2011-2029).

(47) The net purchase price of the sale at retail or use of electric vehicles, hybrid electric vehicles and zero emission vehicles as defined in 75 Pa.C.S. § 102 (relating to definitions). "Net purchase price" shall mean the difference between the purchase price of an electric vehicle, hybrid electric vehicle or zero emission vehicle and the average retail list price of a comparable vehicle. "Comparable vehicle" shall mean, in the case of a passenger car, the overall average list price of a passenger car in the United States; in the case of a passenger truck, the overall average list price of a passenger truck in the United States; and, in the case of a van, the overall average retail list price of a van in the United States. The Department of Revenue shall promulgate rules and regulations to enforce this exemption and determine the average retail list price as defined under "comparable vehicle" on an annual basis. In the event that a qualified motor vehicle is something other than a passenger car, passenger truck or van, the Department of Revenue shall determine the average list price of a comparable vehicle classification. This clause shall expire December 31, 1999.

(48) The sale at retail or use of power units for vehicles that are exempt under clause (47). This clause shall expire December 31, 1999.

(49) The sale at retail or use of food and beverages by nonprofit associations which support sports programs. For

purposes of this clause, the phrases:

(i) "nonprofit association" means an entity which is organized as a nonprofit corporation or nonprofit unincorporated association under the laws of this Commonwealth or the United States or any entity which is authorized to do business in this Commonwealth as a nonprofit corporation or unincorporated association under the laws of this Commonwealth, including, but not limited to, youth or athletic associations, volunteer fire, ambulance, religious, charitable, fraternal, veterans, civic, or any separately chartered auxiliary of the foregoing, if organized and operated on a nonprofit basis;

(ii) Deleted.

(iii) Deleted.

(iv) "sports program" means baseball (including softball), football, basketball, soccer and any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 (Public Law 95-606, 36 U.S.C. § 371 et seq.), the Amateur Athletic Union or the National Collegiate Athletic Association. The term shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are 18 years of age or younger or whose 19th birthday occurs during the year of participation or the competitive season, whichever is longer. There shall, however, be no age limitation for programs operated for persons with physical handicaps or persons with mental retardation;

(v) "support" means the funds raised from sales are used

to pay the expenses of a sports program or the nonprofit association sells the food and beverages at a location where a sports program is being conducted under this act.

(50) The sale at retail or use of subscriptions for magazines. The term "magazine" refers to a periodical published at regular intervals not exceeding three months and which are circulated among the general public, containing matters of general interest and reports of current events published for the purpose of disseminating information of a public character or devoted to literature, the sciences, art or some special industry. This exclusion shall also include any printed advertising material circulated with the periodical or publication regardless of where or by whom the printed advertising material was produced.

(51) The sale at retail or use of interior office building cleaning services but only as relates to the costs of the supplied employe, which costs are wages, salaries, bonuses and commissions, employment benefits, expense reimbursements, and payroll and withholding taxes, to the extent that these costs are specifically itemized or that these costs in aggregate are stated in billings from the vender or supplying entity.

(52) Deleted.

(53) The sale at retail or use of candy or gum regardless of the location from which the candy or gum is sold.

(54) The sale at retail to or use by a producer of commercial motion pictures of any tangible personal property directly used in the production of a feature- length commercial motion picture distributed to a national audience: Provided, however, That the production of any motion picture for which

the property will be used does not violate any Federal or State law; and Provided further That the purchaser shall furnish to the vendor a certificate substantially in the form as the Department of Community and Economic Development may, by regulation, prescribe, stating that the sale is exempt from tax pursuant to this clause.

(55) The sale at retail or use of horses to be used exclusively for commercial racing activities and the sale at retail and use of feed, bedding, grooming supplies, riding tack, farrier services, portable stalls and sulkies for horses used exclusively for commercial racing activities.

(56) The sale at retail or use of tangible personal property or services used, transferred or consumed in installing or repairing equipment or devices designed to assist persons in ascending or descending a stairway when:

(i) The equipment or devices are used by a person who, by virtue of a physical disability, is unable to ascend or descend stairs without the aid of such equipment or device.

(ii) The equipment or device is installed or used in such person's place of residence.

(iii) A physician has certified the physical disability of the person in whose residence the equipment or device is installed or used.

(57) The sale at retail to or use by a construction contractor of building machinery and equipment and services thereto that are:

(i) transferred pursuant to a construction contract for any

charitable organization, volunteer firemen's organization, nonprofit educational institution or religious organization for religious purposes, provided that the building machinery and equipment and services thereto are not used in any unrelated trade or business; or

(ii) transferred to the United States or the Commonwealth or its instrumentalities or political subdivisions.

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IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, and ROBERT A. JUDGE, SR., SECRETARY OF THE DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

FELICE NEWMAN and STEVE ZUPCIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

THE PETITION FAILS TO PRESENT ANY COMPELLING REASONS TO GRANT REVIEW

A. This Case Is Controlled By *Texas Monthly*

The Supreme Court has already decided this issue. In *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), this court faced the exact kind of taxing scheme presented by the case at bar and determined that such a scheme violated the Establishment Clause of the First Amendment. The plurality opinion in *Texas Monthly* has been cited with approval by this court as recently as 1994 in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

Texas Monthly is still good law and should control disposition of this matter.

B. There Is No Tension Between The Holdings In *Walz* And *Texas Monthly*

The thrust of Petitioner's argument is that there is conflict or tension between the Court's holding in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and that this Court should undertake review to resolve that conflict. It is the contention of Respondent that no such conflict exists and that no review is necessary.

In *Walz*, the Court made it clear that the exemption of church held real estate from the imposition of real estate taxes was part of an overall secular scheme of tax relief granted by the taxing authority to a broad range of organizations, including museums, hospitals, zoos, school, churches and synagogues, among others, because the taxing authority had decided that organizations engaged in not for profit, charitable or educational work should receive such a break. It is critical to note that the tax scheme

had a clear, identifiable secular purpose, and the fact that religious organizations happen to fall into that broad secular category did not alter the secular purpose of the legislation.

The same cannot be said of the tax scheme currently before the Court. The legislature of the Commonwealth of Pennsylvania has essentially hand picked a number of articles it has chosen to exempt from sales tax, and the only common thread connecting those articles is simply that they have been so chosen.

Petitioner has correctly noted (Pet., page 3) that "*among* the categories exempted are a wide array of items related to expressive, charitable, educational and religious activities," (emphasis provided) and therein lies the problem.

Under the statute in question, (Section 7204 of the Pennsylvania Tax Reform Code of 1971, Title 72 Pa. Stat. Ann. § 7204) such diverse items as water, toothpaste, toilet paper, feminine hygiene products, steam, gas and fuel oil, electricity, false teeth, caskets, mail order materials, tourism materials, coal, crutches and magazine subscriptions, among others, are specifically named and exempted from the imposition of sales tax. Included in this hodge podge are the items challenged in this cause of action, . . . [t]he sale . . . or use of religious publications sold by religious groups and Bibles and religious articles (§ 7204, Subsection 28). Unlike the situation presented in *Walz*, there is no overarching secular scheme that rationally and reasonably connects the products chosen by the Pennsylvania legislature for exemption.

While there will always be inherent tension between the Free Exercise Clause and the Establishment Clause, the facts of this case distinguish it from such cases as *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). In *Amos*, the Court drew a clear distinction between exempting religious organizations under the Free Exercise clause from laws that may interfere

with their internal operations and those laws which, forbidden under *Lemon*,[1] have the government advancing religion through its own activities and influence.

Surely the Commonwealth's decision to identify religious articles and include them in a group of otherwise unrelated items as entitled to exemption from Pennsylvania sales tax is the very kind of direct advancement of religion prohibited by *Lemon*. As Justice Brennan wrote in *Texas Monthly*,

> (T)he core notion animating the requirement that a statute possess "a secular legislative purpose" and that "its principal or primary effect . . . be one that neither advances nor inhibits religion," *Lemon v. Kurtzman*, is not only that government may not be overly hostile to religion but also that it may not place its prestige, coercive authority or resources behind a single religious faith *or behind religious beliefs in general*, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

489 U.S. at 9. (Emphasis provided).

The action of the Commonwealth in hand-picking religious articles for favored treatment under the sales tax code clearly places the prestige and coercive authority of the state behind religious beliefs in general and must therefore fail under traditional *Lemon* analysis.

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1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

C. The Precedential Value Of *Texas Monthly*

Lastly, Petitioner argues that *Texas Monthly*, as a plurality opinion, lacks sufficient precedential value to be binding on this matter. It is a specious argument.

As the Pennsylvania Supreme Court correctly noted, Justice Brennan's plurality opinion, supported by only two other justices, was essentially based on the "breadth of coverage" standard enunciated in *Walz*. Justice Blackmun, joined by Justice O'Connor, in a concurring opinion, essentially agreed with the plurality opinion with respect to "breadth of coverage" standard of review when he wrote

> . . . by confining the tax exemption exclusively to the sale of *religious* publications, Texas engaged in preferential support for the communication of religious messages.

489 U.S. at 29. (Emphasis provided).

While holding to a narrower scope of analysis than Justice Brennan's plurality opinion, Justice Blackmun nonetheless wrote

> (w)e need to decide here only whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause. I conclude that it does.

Id.

Thus five justices in *Texas Monthly* concluded that a sales tax exemption of the type under present review violates the Establishment Clause, and that constitutes a majority of the court.[2]

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2. Justice White, in a separate concurrence, concluded that the tax scheme constitutes content based discrimination and therefore violates the Free Press Clause. Thus six justices found that the tax scheme in question violates various sections of the First Amendment.

CONCLUSION

Based upon the clear precedent established by *Walz* and *Texas Monthly*, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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